See Vol 3393

No. 21,252

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM F. SCANLAN,
Appellant,

vs.

ANHEUSER-BUSCH, INC.,
a corporation, et al.,
Appellees.

APPELLANT'S PETITION FOR A REHEARING AND REQUEST FOR A HEARING IN BANC

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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INTRODUCTION AND REFERENCES

Appellant is in receipt of the proposed opinion of the Court in this cause and respectfully petitions for a rehearing and for a hearing *in banc* upon the rehearing herein sought. References herein are as set forth in appellant's briefs to appellee's brief as RB, and, to the proposed opinion, as paginated in the official advance opinion, and, unless otherwise indicated, emphasis, insertions, and omissions in quotations herein are supplied by counsel.

I.

THE PROPOSED OPINION DOES NOT FOLLOW THE RULES OF DECISION OF THE COURT IN REVIEW OF MOTIONS FOR DIRECTED VERDICT.

Appellant respectfully submits that the Court has erroneously disregarded the principles heretofore announced by the Court in respect to the appellate review of orders granting motions for directed verdict.

Appellant particularly advanced the reservations of Rules 38 (a) and 50, Rules of Civil Procedure, protecting the right to trial by jury and (Rule 50) requiring that motions for directed verdict shall state the specific grounds therefor.

Appellant respectfully requests reconsideration of this omission to assimilate the rules of civil procedure and integrated rule of decision to this point on the instant record and further submits that the absence of such statement of grounds was prejudicial in that it deprived appellant of the opportunity to advance and augment the record below.

Secondly, appellant respectfully submits that the Court necessarily fails to apply the principles applicable to review of directed verdicts announced by the Court, itself, in the well considered case of *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449, 452, analyzed and quoted

in appellant's opening brief (AOB 19) affirmed (..... U.S. .....; 19 L.ed.2d 621, 626; 88 S.Ct. .....) in these respects.

As this defect in the proceedings below is adequately documented in appellant's opening brief (AOB 19-23, to which no response is made in appellees' brief) and is fortified by the declination of appellee to seek to rehabilitate the ruling of the trial court (as pointed out in appellant's closing brief, ACB 3-6, 17), it is respectfully submitted that it stands conceded by appellees that a lawful motion for directed verdict was not *sub judice* below, at any time.

In this connection, it should be noted that of the *two judges presiding in the trial court, one ruling on summary judgment upon depositions* of the same content as the reporter's transcript herein, *and the other ruling on the purported motion for directed verdict, reached directly opposed conclusions upon the evidence* related to crucial issues of fact in the cause. See Memorandum and Order on summary judgment (CT 343-347, particularly at 345 and 346).

There is no word in this record to suggest that appellant ever "refused" to purchase Busch Bavarian beer and it is a stipulated fact (pretrial order, paragraph 9, CT 426:6-9) that "defendant *Anheuser-Busch informed plaintiff that it would no longer sell* . . . beer to him for resale . . ." (CT 426:6-9).

Further, the rulings above quoted are contrary to all the direct evidence in the record (see references given in AOB at pages 64 et seq. and appendices 1-4 hereto).

Appellant testified further to this point (RT 214:23-26; 215:22-216:4; 226:13-24; and 229:7-10, 19-23), in part:

> "*They told me that they wanted a separate operation*[1] then with only Anheuser-Busch products on the

[1]Representatives of Anheuser-Busch and of Theo H. Hamm had meetings, during the former's meetings with distributors in February of 1963, and developed an agreement among them to divide

trucks and *nothing under that roof but their products.*"

* * * * * * *

"A. I told him, 'George, *I don't want to give up the line and you know that I don't want to give up the line. This is your move* and you're the one that is setting the date. You pick the time. It isn't my time to pick.' "

Since the other rulings contained in the proposed opinion are necessarily based upon the false assumption that appellant, either himself terminated the relationship, or sought to impose wrongful conditions upon its continuance, it is respectfully submitted that reconsideration of the proposed rulings is necessary to the proper review of the order taking this case from the jury and that a rehearing should be granted for this purpose, in all events.

II.

APPELLANT MADE A FULL CASE ON HIS CONTRACT CLAIM AND THE LETTER-POSTSCRIPT WAS EXPRESSLY RESTRICTED TO THE DEFENSE AND LIMITED TO MATTERS OF "CREDIBILITY", FOR JURY RESOLUTION.

Appellant respectfully submits that it can only be fairly put dogmatically that the testimony in this trial would be found sufficient, if submitted in support of a verdict upon plaintiff's second cause of action, breach of contract (see quotation and references, AOB 24-48). The decision of this Court in *Kelly-Springfield Tire Co. v. Bobo*, 4 F.2d 71, would appear to require such a holding. Similarly, the California courts would be required to follow *Burgermeister Brewing Corp. v. Bowman*, 227 C.A. 2d 274; 38 Cal.Rptr. 597, (hearing denied).

Appellant must, therefore, respectfully urge that the statement in the proposed opinion (page 2) that "there

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territories and distributors between the two breweries. See abstracts of testimony of Flanigan and of appellant appended hereto as Appendices 1 and 2.

was no evidence of such a contract'' is simply insupportable. (Please see the abstracts and references to the record set forth in appellant's opening brief, pages 24-48.)

Further, appellant respectfully takes the liberty of suggesting that the actual rationale of the Court (page 2) is that the admitted negotiations, the conceded consensus and appellant's actual performance of all undertakings and conditions, as agreed upon and accepted by both parties, *prior* to the receipt of the letter-postscript released, or otherwise supplanted, the negotiated agreement.[2]

That all this could proceed upon the understanding, or assumption, that appellant would receive one load of beer, or might never receive any at all—or having received one load, but might never receive another—inevitably assumes an unthinkable mental deficiency on appellant's part. Certainly, and assuming *arguendo,* that the letter-postscript ''was anything at all'', it was matter for the jury to resolve whether appellant had, in fact, knowingly proceeded in the mindless manner suggested.

All this occurred in California and it is statutory, as well as decisional, law that ''*A voluntary acceptance of the benefit of a transaction is a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.*'' (Civ. Code, Sec. 1589.)

See *Durgin v. Kaplan,* 68 A.C. 79, 88, 89, decided January 23, 1968; *Calif. State Automobile etc. Bureau v. Barrett Garages, Inc.,* 257 A.C.A. 84 (December 18, 1967) at pages 88, 89, 90, 91, 92.

In *Anheuser-Busch, Inc. v. Jefferson Distributing Co.,* 353 F.2d 956 (5th Circuit), (cited page 2), *there is no*

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[2]The two "prior" letters merely state that the purchase of the Barossos' beer business was not to be deemed to include the purchase of any of the "good will" of Anheuser-Busch. The order-to-order letter of September 26, 1961, arrived *after* appellant had fully performed every act and accomplished every condition *negotiated* at the Eden Motor Lodge *with Elliott,* Leadholm and Fred Barosso.

suggestion that that distributor ever had a negotiated agreement, or any negotiations whatever, with the brewery and was, therefore, simply a job-lot buyer.[3] In *Rohem Distributing Company v. Burgermeister Brewing Corporation* (196 Cal.App.2d 678, similarly cited by the Court, page 2), it was expressly stated in the written agreement that it supplanted "the prior existence of the oral contract" *(Burgermeister Brewing Corporation v. Boeman,* 227 Cal.App.2d 274, 38 Cal.Rptr. 597).

As in *Simpson v. Union Oil Company,* 377 U.S. 13, 12 L.ed.2d 98, 84 S.Ct. 1051, the "clever draftsmanship" of the brewery's attorneys must give way before the law.

Nothing in the record related to the letter postscripts can be considered as a judicial admission (compare *Fleischmann Distilling Co. v. Maier Brewing Corp.,* 314 F.2d 149, 158-159) and, moreover, at appellant's insistence, the trial court made a definitive ruling during pretrial conference, binding upon *both* parties to this action, that these letter-postscripts could *only be used in the defense of appellee brewery.* See the ruling of the trial court in pretrial conference (RT 38:11-15).

The proper resolution of the effect, if any, of the letters calls for the application of the ruling of the Court in its most recent decision upon an indistinguishable situation in *Standard Oil Co. of California v. Perkins,* 347 F.2d 379, 383, 384 (1965), wherein the Court affirmed judgment on the verdict of the jury, awarding recovery upon the breach of an earlier agreement between the parties, notwithstanding the subsequent execution of an "adhesion"—but complete and valid—contract.

If a plaintiff's verdict was required to be affirmed in *Standard Oil,* no good cause could be marshalled to with-

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[3]Herein there was *no* written notice of termination! Hence—if the letter-postscript were *the* agreement—it was breached and repudiated, in all events.

hold submission of this appellant's contract claim from this jury.

III.

THE CONSPIRATORIAL AND TORTIOUS INTERFERENCE COUNT IS PROVED.

The only "defect" in proof on this cause of action is stated by the Court (pages 2-3) as follows:

> "Appellee's first contact with Barosso was initiated by Barosso himself. He had been *serving* the territory for distributors of Anheuser-Busch products *for over 20 years.* He had not sold *his*[4] business or goodwill to appellant (only certain business assets), and had not made any covenant not to compete."

The conduct proved (quotation and references, AOB 48-54) is unfair competition—by definition—under California common law (see cases cited, AOB 54-60). The reference to the "first contact"—after 20 years dealing with appellee brewery—is adequately answered in *Bancroft-Whitney Co. v. Glen,* 64 C.2d 327, 345, 49 Cal.Rptr. 825, 411 P.2d 921 as follows:

> "We hold, for the reasons hereinafter stated, that the evidence shows as a matter of law that Glen violated his duties to plaintiff and that the other defendants, having cooperated in and reaped the fruits of his violation, are guilty of unfair competition."

Reconsideration of this ruling is necessary to a just disposition of this cause, and should be afforded this appellant.

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[4]Literally, it is true that Fred Barosso did not sell *his* business; factually, the quoted statement is contrary to the evidence, because the Barosso partnership sold *their beer business* and the *partners ceased* business, altogether, and *both* became full time employees (as did key employees of the partnership) of appellant in *his* beer business.

IV.

THE ANTITRUST CLAIMS ARE FULLY SUPPORTED AND SHOULD BE SUBMITTED TO A JURY.

As noted in part I hereof, the Court appears to have proceeded upon the erroneous assumption that appellant refused to deal with appellee brewery—contrary to the stipulated and admitted facts—and (by reference to *Ace*,[5] 318 F.2d 283) to have assumed that the admitted conspiratorial conduct established by such facts is somehow benign, as not affecting competition.

The "one merchant" concept can have no relevance in private enforcement of the antitrust laws—inasmuch as (absent an atypical class action) the private action plaintiff must always be "one merchant". It would seem, further, that the Supreme Court has authoritatively eliminated the "one merchant" concept from private enforcement of the antitrust laws in its trail-blazing decision in *Klor's, Inc. v. Broadway-Hale Stores,* 358 U.S. 809, 3 L.ed.2d 54, 79 S.Ct. 23, and reiterated and applied—with full vigor—in *Simpson v. Union Oil Company of California,* 377 U.S. 13, 12 L.ed.2d 98.

Since the Court has indicated that it would otherwise have followed *Walker, Girardi, Klor's, Simpson* and similar rulings and it is shown that every element necessary to invoke such rules of decision is here proved (appellant's opening brief 60-81 and appendices 1-4 hereto), it is submitted that reconsideration of the antitrust claims is required.

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[5]It is noted that *Ace Beer Distributors, Inc. v. Kohn, Inc.,* 318 F.2d 283, (ACB 15, 18, 20) dealt with a *judgment* on the *pleadings* in which there was no allegation that the tortious conduct *affected competition* in interstate commerce! *Compare Speegle v. Board of Fire Underwriters,* 29 C.2d 34 and *Kold Kist v. Amalgamated Meat Cutters,* 99 C.A.2d 191, relating to the first cause of action, and *Crane Distributing Co. v. Glenmore Distributors,* 267 F.2d 343 (6th Circuit) on the fourth cause of action (all cited AOB 63-81 and ACB 20 herein).

It is demonstrated that appellant established—not only the conspiracy to refuse to lawfully deal with him to his injury—but that this conduct was purposed, effective and carried out pursuant to the *Walker*-type conspiracy to (1) exclude other "popular priced beers" from the business of Anheuser-Busch distributors, and (2) to tie-in sales of Busch Bavarian to Budweiser and Michelob beers. Compare the decision of this Court in *Jerrold Electronics Corp. v. West Coast Broadcasting Co.* (341 Feb. 652, 661-665.) Nothing more was established in *United States v. Jos. Schlitz,* 253 F.Supp. 129, 149, affirmed U.S. ..... 17 L.ed.2d 35, 87 S.Ct. ....., in the same industry, in the same places and during the same period of time.

The ruling therein was, in part:

> ". . . it is clear that *Schlitz could and did* 'force' its full line of products into some outlets and *take its products away from other outlets. In either case, the wholesalers involved become less effective distributors for the products of other brewers.* Thus, . . . had and *would continue to have serious anti-competitive consequences at the important wholesale level in the beer industry.*"

Schlitz only considered 31 distributor changes of this nature whereas it is expressly admitted (by answers to interrogatories) that appellee brewery had already required 14, of 34, of its existing distributors to "drop" a competitor's brand to take on Busch Bavarian beer.

Such tie-in sales are uniformly prescribed as per se violations of the antitrust laws. See, in relation to sales of alcoholic beverages, *Black v. Magnolia* (365 U.S. 24, 25, 2 L.ed.2d 5, 7, 106 S.Ct. 106) namely: "*Tying agreements by which the sale of one commodity is conditioned on the purchase of another have been repeatedly condemned under the antitrust laws,* since they serve no purpose beyond the suppression of competition."

Simpson, supra, 377 U.S. 13, teaches that a manufacturer and its distributors compose an unlawful conspiracy,

or combination, for all purposes of a private action, particularly when the distributors are "laced in" by such devices as the order-to-order letter postscript device herein to prevent the exercise of their independent judgment as independent purchasers of merchandise.

On the California antitrust claim the rulings in the cases of *Speegle v. Board of Fire Underwriters, supra,* 29 Cal.2d 34 and *Kold Kist v. Amalgamated Meat Cutters, supra,* 99 C.A.2d 192, require submission of this evidence to a jury (summary, Appellant's Opening Brief 60-81, Appellant's Closing Brief 14-23 and appendices 1-4 hereto).

The California statute (section 16720 of the Business and Professions Code) specifically proscribes restraints and restrictions "to prevent competition in the purchase of merchandise" and further proscribes (16727) any sale on the "understanding that the . . . purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller" and it is the California rule of decision that "*the statute . . . makes no exception* in favor of contract only in *partial restraint* of trade" *(Chamberlain v. Augustine,* 172 Cal. 285, 288; see, also, *Morey v. Paladini,* 187 Cal. 738).

The "defensive" claim (being defensive was not reached below) of pretended "necessity" has been laid to rest in each ruling of the Supreme Court (e.g., *United States v. General Motors Corporation, et al.,* 384 U.S. 127, 16 L.ed.2d 415, 86 S.Ct. 1321, and cases cited, and compare the testimony abstracted in appendices 1-4 hereto).

The sober fact is that each element of this subject matter is factual and presents a jury issue—not to be disposed of by categorical imperatives in mid-trial as the instant order and judgment would do. These considerations deserve reexamination and a rehearing should be granted to permit it.

V.

A HEARING IN BANC SHOULD BE GRANTED IN VIEW OF THE FAILURE OF THE PROPOSED OPINION TO NOTICE LEADING AND APPLICABLE DECISIONS IN THIS CIRCUIT AND OF THE SUPREME COURT.

Since it is believed only fair to state that the proposed opinion does not refer to, nor seek to implement, the rules the decision announced in other decisions of the Court, a hearing in banc should be granted herein.

Appellant particularly calls attention to decisions of the Court in the following categories as in conflict with the proposed opinion herein, namely: (1) the rule of decision relating to the standards of review of the record on motions for direction of a verdict and Rule 50 in respect to the requirement of statement of grounds for the motion, as in *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449; (2) the case of *Kelly-Springfield Tire Co. v. Bobo*, 4 F.2d 71 in respect to the substantive contract rights established by the instant record; (3) the rule of interpretation applicable to the letter-postscript of appelle as declared in *Standard Oil Co. v. Perkins*, 347 F.2d 379, and (4) the rule of decision related to antitrust conspirators among manufacturers and distributors in restraint of trade announced by the Court in *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1; *Girardi v. Gates Rubber, etc., Inc.*, 325 F.2d 744, and *Jerrold Electronics v. West Coast Broadcasting*, 341 F.2d 341; among manufacturers and distributors in restraint of trade; and the declination of the proposed opinion to notice as to apply the rules of decision announced by the Supreme Court in the cases of *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 3 L.ed.2d 741, 79 S.Ct. 705; *Simpson v. Union Oil Company of California*, 377 U.S. 13, 12 L.ed.2d 98, 84 S.Ct. 1051; *United States v. Jos. Schlitz Brewing Company* (U.S.D.C. N.C. Cal. S.D.) 253 F.Supp. 129 (March 24, 1966) aff'd U.S. 17 L.ed.2d 35, ... S.Ct. ....., and *General Motors Corporation v. United States*, 384 U.S. 127, 86 S.Ct. 1321, arising in the circuit.

Secondly, the California statutes and decisional law are not noticed in respect to the three state claims, including parallel decisions reported since the submission herein (see part II hereof, supra).

Thirdly, the trial court did not obtain jurisdiction of the cause—except the fourth cause of action—because defendants Flanigan, Elliott, et al., are natural persons and California residents, as is appellant, and appellant timely moved to remand after removal of the cause from the state court.

It is respectfully submitted that a rehearing should be granted and, upon rehearing, a hearing in banc should be ordered to conform material rulings in the cause to applicable precedents in this circuit.

Dated, San Francisco, California,
February 9, 1968.

Respectfully submitted,
J. Albert Hutchinson,
Attorney for Appellant and Petitioner.

Certificate of Counsel

I hereby certify that I have read the foregoing Petition for Rehearing and that said Petition in my judgment is well founded and not interposed for the purpose of delay.

J. Albert Hutchinson,
Attorney for Appellant and Petitioner.

(Appendices Follow)

Appendices.

Appendix I

ABSTRACTS OF TESTIMONY OF JOHN FLANIGAN (RT 1023-1031).

"Mr. Hutchinson: I think I should read the first one which appears at page 22, your Honor, because this occurred at the meeting with Mr. Scanlan *on the 8th,* as we understand it, of *February, 1963.*

'Q. Now, with respect to Hamm's in the discussion of Hamm's with Mr. Scanlan, *did he not ask you if you had on behalf of Anheuser-Busch discussed any of these rearrangements with the representatives of Hamm's?*

A. He did ask us that.

Q. Do you recall your reply?

A. I don't recall the reply exactly, but we had no definitive answer from Hamm's.'

I think that implies that they had discussed it certainly.

Then on page 29—I think this passage brings it up to the point where we are considering—page 29.

'Q. Was Mr. Scanlan as a result of this meeting of February to make any decision on that at the request of the brewery, namely, to give up or continue with Budweiser and Michelob?

A. No. *The meeting in February occurred right after Hamm's officials had been to California and had fairly well stated their position, which was in opposition to a position that they took down south with Ace Beverage,* and I felt that although Mr. Fiege had been quite harsh on one of the Hamm's wholesalers while he was here, and this was general knowledge at the convention, I felt that Scanlan's picture was somewhat different, because of the territory, the problems of the territory, and that Mr. Fiege when he got back

to St. Paul would relent in this particular case and perhaps would let Bill work this out as we had discussed. I might point out that Mr. Elliott didn't share my opinion of Mr. Fiege's generosity.

Q. Did Mr. Fiege make whatever statements you are referring to to you?

A. No.

Q. Were they recorded or reported in public prints?

A. No.

Q. Could you tell us the source of information as to what Mr. Fiege had said on the subject?

A. Walter Markstien.

Q. Markstien?

A. Yes. He was the wholesaler to whom he made them.

Q. *He is presently a distributor for this brewery, Anheuser-Busch?*

A. Yes, in San Francisco.

Q. And he was a year or two prior——

A. *He was a distributor for Hamm's and Budweiser for a number of years prior to that.*

Q. *When the Busch Bavarian situation developed, he ceased to be a distributor for Hamm's; is that right?*

A. *As a fact, yes.* When Busch Bavarian came into the market, he no longer distributed Hamm's.

Q. At the same time, you had another distributor in San Francisco; was it Rossi?

A. Rossi.

Q. And he had been distributing Anheuser-Busch products and what else?

A. Hamm's.

Q. *And as a result of Busch Bavarian, Rossi was terminated as Distributor to Anheuser-Busch products?*

A. *He was.*

Q. *And Markstien then took over the whole city?*

A. *The entire San Francisco City.*

Q. Now, with respect to Rossi, how did the termination of his relations with Anheuser-Busch come about?

A. Well, when it became evident that Markstein was no longer going to be able to keep Hamm's, and *since Rossi was an outgrowth of our original arrangements with Hamm's for distribution in San Francisco, we recognized that the Rossi area would have to be incorporated into the total San Francisco area,* and we therefore did not offer or suggest to Rossi that he take on Busch Bavarian. We told him what we were going to do out of courtesy. But we knew ahead of time that we would have to incorporate the entire matter to make it a reasonably economic situation.

Q. Was Rossi ever given a written notice of termination?

Mr. Hanger: A written notice of *determination.*

Mr. Hutchinson: Excuse me.

Q. Was Rossi ever given a written notice of determination?

A. I don't know.

Q. *Now, you said that you had an arrangement with Markstien and Rossi and Hamm's regarding distribution of Hamm's and Anheuser-Busch products. Do I understand that you had some arrangement with Hamm's at an earlier time on the subject?*

A. Hamm's and ourselves handled this as a brewery branch of the City of San Francisco originally, with the exception of the Rossi territory, which Hamm's was servicing through Rossi. We were both anxious to discontinue our branches and felt we could

—with the dual volume be of interest to the wholesaler.

Q. *Prior to the Busch Bavarian situation, you had had meetings with Hamm's and discussed this business of distributors' territories and the like?*

A. Some years before this.

Q. Did you personally participate in these meetings or discussions?

A. In some of them.

Q. With whom did you talk on behalf of Hamm's?

A. I talked to Herm Newhouse, to Herschback, and, I don't think we talked to—no, I guess we talked to Herb Goodwin from time to time.

Q. Can you give us the approximate date of the first of these meetings?

A. Not off hand.

Q. Can you give us the year?

A. I can't even give you that specifically. It preceded the time that Markstien entered the market and it is a matter of record somewhere.

Q. Before 1961?

A. To be honest with you, my memory is cloudy on the date that we changed from a branch—it seems to me it was before that.

Q. And that would have been then when you changed from the branch operation. What date was that?

A. If I knew that date, I could give you a general idea of when the other was.

Mr. Scanlan: I can refresh you. It was before the strike and the strike was in 1958.

The Witness: It was pretty far back and I just can't remember the date. But we can find that.

Q. (By Mr. Hutchinson) Some time then earlier than 1960?

A. I would think so.

Q. *Now, by "Brewery branch",* I take it you mean that you kept a warehouse or some supply here in some fashion to supply other distributors than Markstein and Rossi; is that right?

A. No. *We operated as a wholesaler, as a—the brewery operated a distributorship as opposed to an independent distributor.*

Q. In other words, Anheuser-Busch actually had a selling operation here in San Francisco?

A. Correct.

Q. And how long did it continue?

A. Well, it continued off and on from about the time we came back into the market—it was an off-again-on-again sort of thing. We would have a wholesaler; then we would have a branch; then we would have a wholesaler, from about 1947 on.

Q. *It is your understanding, is it not, that the brewery could sell direct to retailers at any time anywhere in the State?*

A. *Yes.*

Q. So choosing a distributor was a matter of misjudgment rather than any restriction on the legal capacity of the brewery function?

A. Correct.'

* * *

'Q. Now, what was Herm Newhouse's office or title, if you know?

A. I believe he was Sales Manager, Northern California.

Q. As far as you know, he is not a corporate officer?

A. As far as I know, he is not.

Q. He is no longer with Hamm's?

A. He was with Hamm's.

Q. But he is not now?

A. He is no longer with Hamm's, correct.

And then at the bottom of that page I will read one sentence.

Q. When he was working for Anheuser-Busch?——'

The Court: Read that again. That seems to be the crux. This is in the February, 1963 area.

Mr. Hutchinson: Yes. I will start re-reading at page 33, line 9, which I think is the point the Court probably has in mind.

'Q. Now, what else with regard to Hamm's? When Rossi and Markstein were to change around, as you have indicated, was there a further meeting between you and some Hamm's representative?

A. I had luncheon with Herm Newhouse to see if I could determine their feelings on the matter, since we had a number of Hamm's wholesalers, and since we were actually to—or since the wholesalers themselves were somewhat confused as to the position of Hamm's and where they were going to, what was going to happen, I was hopeful that I would be able to clear the air. This luncheon was at the Fairmont Hotel and I think about the time of the February 8th meeting.

Q. Now, what was Herm Newhouse's office or title, if you know?

A. I believe he was Sales Manager, Northern California.

Q. As far as you know, he is not a corporate officer?

A. As far as I know, he is not.

Q. He is no longer with Hamm's?

A. He was with Hamm's.'

I think the other portions sort of carry forward the same ideas, though there may be something more specific.''

(RT 1023:14-1031:25.)

Appendix 2

ABSTRACTS OF TESTIMONY OF WILLIAM F. SCANLAN (RT 208-216, 226, 228-229).

"Q. Following the luncheon you did have a particular meeting then with Mr. Elliott and Mr. Flanigan?

A. Yes, yes, I did, at 1:00 o'clock was my scheduled time.

Q. Now, was this in an office or suite of rooms, residential rooms in the hotel?

A. It would be a suite of rooms in the Fairmont Hotel.

Q. Was anyone else present other than the two of you—the two of them and yourself?

A. No, that was all that was there.

Q. Now, omitting the pleasantries and casual remarks, would you give us, as best you recall, the discussion in so far as it related to the business of the brewery and affected you that preceded, indicating if you can, each individual who spoke and the substance of what they had to say?

A. Yes. I was brought into this room and seated and Mr. Flanigan took the floor and told me, 'Bill, you know what this is all about and we are coming with Busch Bavarian.' And I said, 'Fine.' And I sat attentively and listened. He had a chart listing all of the California breweries in their sales or their sales position as far as barrels or gallonages are concerned, showing their position or whether they was in a plus position for the previous year, for 1962, or whether they was in a down position where each brewery stood in the industry as far as California sales were concerned. He went over this quite thoroughly and pointed out all the weaknesses in some and the strength in one.

* * *

Q. Do you recall how Mr. Flanigan requested your views; do you remember how he put it?

A. Yes, he did. He made the statements, and he said, 'You can see our position that *all these California breweries, with the exception of Hamm's, are down in sales, and this looks like our opportune time to move into the California beer market. Some of these breweries are getting pretty weak and some of them won't survive.'*

* * *

Q. Now, was anything further said about your views or your activity, if any, in respect to the introduction of the Busch Bavarian brand in your territory?

A. Yes, he did. He says, 'Now, we're coming with this program and *we expect all of our wholesalers to give up something.'*

Q. This was Mr. Flanigan?

A. Yes, Mr. Flanigan.

Q. Was he more specific in any of his remarks at that time as to what the 'something to be given up' might be?

A. Well, yes. He says that 'We realize because we are a premium priced beer up till now that *we are in with every brand of beer listed on this chart or in the State of California,* and coming with this *we are going to upset the whole beer business because we are in with some brand in almost every wholesalership in the State of California.'*

Q. Now, in respect to the—in respect to your views as to your territory, were those requested or solicited by either of these gentlemen?

A. Well, my views, or they had some projected figures for the sale of Busch-Bavarian.

Q. In San Joaquin County?

A. Yes, for San Joaquin County.

Q. Do you recall the approximate projection, the amount in cases, or whatever other measure it might be?

A. Yes, I do. They had a projected sales figure of 88,000 cases of Busch Bavarian for that year plus a 45,000 known sales of Budweiser the previous year.

Q. Now, did they ask your views as to the likelihood of attaining that amount of sales or anything of that nature?

A. Yes. I listened to them and told them at that time that their anticipated sales or their projected sales, that there was just no way that any beer wholesaler could make a go of anything like this in the Stockton market. It was—conditions were too hard and too tough and they just didn't have enough boxes or cases slated for a wholesaler to even come close to making it.

Q. Now, in that connection, did you call to their attention or they call to yours, the sales of Hamm's or any other beer being sold in San Joaquin County?

* * *

A. I told them it was an impossible situation for me *to even consider dropping a brand of beer like Hamm's,* that I was selling in excess of 200,000 cases for an unknown 88,000 anticipated sales plus 45,000 known sales, and I am taking a big pay cut and going bankrupt on this basis.

Q. What, if anything, was said in response to that statement, if there was any, by either of the other men?

A. Yes. John replied and he said, 'Well, Bill, maybe we got our sights set too high then in this situation. As far as you dropping Hamm's maybe that would be—we couldn't expect you then to do it under these——'

Mr. Hutchinson: He's speaking to the witness.

The Court: Who was it who said that, —Flanigan?

The Witness: This would be John, yes, John talking to me.

The Court: John Flanigan. I am sorry. Go ahead.

* * *

The Witness: Yes. John told me that maybe that their analysis of it was wrong and they couldn't expect me then under those situations—they *knew that no one was going out and commit suicide, financial suicide, that way,* and that they, or we better look the situation over a bit closer.

* * *

Q. Now, did anything develop with respect to any arrangements by which *you would attempt to keep Hamm's and also take on Busch Bavarian with the Budweiser and Michelob beers that you were already handling?*

A. No. They told me at that time that they didn't expect an answer right then off me but we discussed the possibilities of different ways to do it.

Q. Now, *was anything said about having a so-called separate operation of some sort?*

A. *Yes, there was.*

* * *

Q. What, if anything, was said about how it would be handled *if it should be carried out, that is, a separate operation;* were you to operate it, or what was the case?

A. *They told me that they wanted a separate operation then with only Anheuser-Busch products on the trucks and nothing under that roof but their products.*

Q. What was said, if anything, about associating personally or your name being associated with such a separate operation if it developed?

A. Well, I mentioned the possibility that maybe I could take Fred Barosso over there and make him the manager of the operation and maintain my present facilities and just have the two warehouses side by side.

* * *

Q. What if anything, did he say?

A. He [Elliot] told me that, 'Bill, that wouldn't be a satisfactory arrangement. We have had Fred Barosso and we have had him for years and find that he is a poor

business man. He does a good sale on the bars and on the off sale accounts but he is just not capable of running the business. We couldn't go along with that at all.'

Q. Was anything said by either of them about your having to associate and associate your name with such a separate operation if it developed?

A. Yes. Then Mr. Elliot told me, he says, 'No, Bill, *if we go into this kind of arrangement we want you to take your name or the Scanlan Distributing Company name and put it over our door where our products are,* and if we build a new building or if you build a new building and our products are in there *we want the name Scanlan Distributing Company. You can find a different name or run the other one or let Fred run the Hamm's end of the operation.'*

Q. Now, in connection with the prospects for Busch Bavarian in San Joaquin County and your part of it, what further was said at this meeting?

A. I reminded Mr. Elliott then, and he was sitting alongside of me, I went back and reminded him of the agreement that I felt was reached in the Eden Motor Lodge when he assured me that they had no plans for Busch Bavarian for California in the immediate future or the near future or the three to five years, or how it was answered.

* * *

Q. What did he state?

A. He just said, 'Bill, things have changed.' "
(RT 208:12-216:20.)

"Q. What, if anything, did Mr. Newhouse respond when you gave him this background and made this final statement?

A. Well, in one of these meetings at that time he made the statement, 'Well, Bill, would you like to get out the way that you got in?' referring to my buying, buying Barosso out.

Q. Did you respond to that?

A. I said, 'Certainly, but are you authorized to offer this?'

Q. What, if anything did he respond?

A. No, he didn't reply to that.

Q. Now, did you have any further discussion with either of these men in relation to the distribution of Anheuser-Busch products following these discussions.

A. Yes, I did. Mr. Newhouse was in the market quite frequently and he always wanted to know what my plans were. *And I told him that my plans hadn't changed a bit,* that we had discussed the possibility of the building, that I had made some inquiries about this and that but ultimately *I would end up and say, 'George, —'* George Newhouse was the name— *'I am happy and content with the deal or arrangement that we made with Hamm's and Budweiser.* Why don't yo go find someone else to carry the Busch Bavarian?' "

(RT 226:3-24.)

"Q. Now, have you related to us, as you now recall, the principal contacts you had with all of the brewery people from the meeting at the Fairmont up until early April around the 9th?

A. Yes.

Q. Now, on April 9th or thereabouts did you receive a call from anyone connected with the brewery?

A. Yes. When I returned to my office there was a return call for me from Mr. Elliott in Van Nuys that I should call him.

* * *

Q. Now, in this call was there any discussion about the *distribution of Anheuser-Busch products?*

A. *Mr. Elliott was apologetic and told me, 'Bill, we have found another wholesaler or somebody that is going to take on the Busch Bavarian line and they want the*

whole package.' They was making arrangements to set up a distributorship and he felt real bad *but he was going to have to terminate me* or, in other words, that I had had it.

* * *

Q. Did he indicate when you would be no longer be able to distribute or buy for resale any of these products?

A. Yes. He said, 'Bill, now what is a good cutting off date for you?' Or, '*When can we cut you off?'*

* * *

Q. What did you say?

A. *I told him, 'George, I don't want to give up the line and you know that I don't want to give up the line.* This is your move and you're the one that is setting the date. You pick the time. It isn't my time to pick.' ''

(RT 228:8-229:23.)

Appendix 3

ABSTRACTS OF TESTIMONY OF CHARLES OROSOLINI (RT 542-547).

"Q. *Did Mr. Newhouse make a proposal to you or request you to consider distribution of Busch Bavarian?*

A. *Yes.* He wanted to know whether I was interested to carry Busch Bavarian. And I listened to his sales talk and he told me about his advertising, all that. *Then I finally asked him, I says, 'Well, it's kind of strange,' I says, 'that you are offering me Busch Bavarian. You have a distributor.' He says, 'Well, yes, that is right.' I said, 'Why don't Bill take it?' He says, 'Well, Bill won't give up Budweiser.'*

* * *

Q. Who was identified as 'Bill'?

A. Scanlan.

Q. What were the brands of beer that he was distributing at that time?

A. *He was distributing Hamm's and that is the beer that he was going to throw out.*

Q. *Now the statement made by Mr. Newhouse was that they weren't going to give Busch Bavarian to Mr. Scanlan, or Bill, as you identified him?*

A. That is right.

Q. Because he wouldn't give up Budweiser, is that correct?

A. *No, because he wouldn't give up Hamm's.*

Q. Thank you. Now, this was the first meeting. Was there any second or later meeting with Mr. Newhouse?

A. Yes; about two or three days later Mr. George Newhouse came back and he had a representative from Budweiser.

* * *

Q. Now, did you have a conversation on the same general subject as the first one at this meeting?

A. No, the conversation that I had the second time was that he wanted to know *whether I would be willing to put in another barn, and in that way, then, I could have the three products of Budweiser.*"

(RT 542:7-543:24.)

* * *

"Q. Now, was there any suggestion that there might be a separate operation of any kind? Was that ever discussed?

A. That was the discussion that we had, that *they wanted me to set up another barn, a separate organization.*"

* * *

"By Mr. Hanger:

* * *

Q. So your conclusion, if it was a conclusion, that you couldn't take on Anheuser-Busch was based on the fact that the Schlitz people had asked you to give up Regal, is that right?

A. *No. I wasn't interested in Budweiser, period.*

Q. The first call that was made on you by Mr. Newhouse *he indicated that he was representing only Busch Bavarian?*

A. *Busch Bavarian, that's right.*

Q. And the first discussion he had with you about taking on this competitive brand dealt with Busch Bavarian?

A. That is right."

(RT 546:2-547:23.)

Appendix 4

ABSTRACTS OF TESTIMONY OF PETE GIAHOS
(RT 442, 446, 458, 467, 532, 537, 538).

"Q. Perhaps I can state it a little more simply:

In connection with the discussion of the Busch Bavarian merchandising program did either Mr. Flanigan or Mr. Elliott or perhaps someone else present point out to you the relative standing in sales of Lucky Lager, Hamm's and other beers?

Mr. Hutchinson: Q. Do you have the question now?

A. Yes.

Q. Now, at that time were you distributing any beer other than the Anheuser-Busch products, Budweiser and Michelob?

A. Yes.

Mr. Hutchinson: Q. What brands were you distributing?

A. We were handling Budweiser, Michelob, Falstaff, Regal, Rainier Ale, Bulldog Stout Malt Liquor and Mexicali.

Q. Now, other than the Budweiser and Michelob brands, those were manufactured and sold by breweries other than Anheuser-Busch, is that right?

A. Yes."

(RT 442:16-443:1.)

"Q. And if I understand then, Mr. George Newhouse was taking over the territory for them in lieu of Mr. Leadholm; is that correct?

A. I believe that is correct.

Q. Now, will you tell us, as best you remember, what you said and *what Mr. George Newhouse said to you in respect to changes, if any, that would occur or should occur in your distribution of various beers upon the advent of the Busch Bavarian beer distribution?*

Mr. Hanger: Same objection for the record.

The Witness: Our basic discussion at this point was that Mr. Newhouse led me to believe that *he couldn't formally tell me that I would be able to handle Busch Bavarian beer unless a competitive line of beer in my house was dropped.*

By Mr. Hutchison:

Q. Did he indicate *what competitive brand was to be dropped?*

* * *

A. *Falstaff.*

Q. Was that a beer commonly referred to in the trade as a popular priced beer?

A. Yes, sir.

Q. And was that about all that Mr. Newhouse said at that time or was there something further?

A. Well, actually he was very new with the company at this point, and I think it was very embarrassing to him, and I kept telling him that it was also very embarrassing to me, but that I felt that *I would like to keep my distributing company intact physically and I realized that he,* being new with the Anheuser-Busch Company, that he *was apparently attempting to convey to me what his company wanted or expected in our marketing area.''*

(RT 446:6-447:15.)

''The Court: Well, Mr. Hanger, let me ask you a question. You don't have to commit yourself on this. But is there any dispute that, first of all, the Bud people said to Scanlan, 'We want you to handle Busch,' and further that because he did not handle Busch they took Bud away from him? *These are admitted facts, aren't they?*

Mr. Hanger: *Well, they took Bud away from him* not specifically because he didn't handle Busch but for other reasons they couldn't find anybody else to handle it. I think that is an admitted fact.

The Court: Wait a minute. I missed you on that. *I asked you whether they took Bud away from Scanlan because he evidently never got around to giving them an answer as to whether he was going to handle Busch.*

Mr. Hanger: I think they took——

The Court: That is the way I interpret the evidence that has come in so far from him.

Mr. Hanger: *That's right,* they took Bud away from him. Now, I think they would have left Bud with Scanlan if they could have found another suitable distributor for Busch in the San Joaquin County. I think the evidence will reflect, and I think that it has already been testified to by Scanlan, that George Newhouse came to him and asked him who else would take it and he went and talked to all those people.

The Court: Let's concede that—I see your point. *There is certainly testimony to that effect on which a jury could reach that conclusion that they took Bud away from him because they wanted to be sure that they'd get a Busch distributor in San Joaquin County;* he hadn't made up his mind as to whether he wanted to handle Busch; they couldn't get anybody else to handle Busch, *and evidently the only way they could get anybody to handle Busch was to tie it in with Bud.*

Mr. Hanger: Right. I don't like to use that expression 'Tie it in' but I think——

The Court: That was an unfortunate statement of mine in the presence of Antitrust lawyers. O.K. That they wanted to have the three of them sold together.

Mr. Hanger: The new distributor insisted on taking Bud and Michelob before he'd take Busch, and Mr. Scanlan's own testimony was that he didn't feel you could take that combination of three beers and make a profit of them, which is why he refused to take on Busch.

Mr. Hutchinson: *He wanted to handle them without restrictions. He didn't refuse to take it but——"*

(RT 458:6-459:24.)

"The Court: . . .

So maybe, Mr. Hutchinson, if you could prove a conspiracy in which Anheuser-Busch was involved, along with some other distributors, Dinubilo, we will say that they were going to make Mr. Giahos give up the sale of Falstaff beer and thus diminish or restrain competition that would otherwise be offered by Falstaff beer, then, if I read this portion of the Walker case correctly, if I understand it, *that would constitute a statement of a cause of claim and if it would be proved it would be a violation under Section 1 of the Sherman Act.*

Do you agree with that, Mr. Hanger?

Mr. Hanger: *I agree that if the brewery conspires with other distributors, say, in different territories, in different areas,* ——

The Court: All right.

Mr. Hanger: ——*To take a particular brand away from another distributor, under Walker the Court says they believe that may constitute a violation of the Sherman Act."*

(RT 467:7-24.)

"By Mr. Hanger:

Q. Mr. Giahos, you said you met with Mr. Flanigan and Mr. Elliott on February 8th or 7th, I believe, is that correct

A. That is correct.

Q. Now, at that time, as you indicated on your direct examination, you had some five or six additional brands other than the Budweiser brand, correct?

A. That is correct.

Q. Including Falstaff, Regal, Rainier Ale, Bulldog Stout Malt Liquor and Mexicali, correct?

A. That is correct.

Q. *Now, at the February 7th meeting had you been asked to bring your total Falstaff sales for the preceding year?*

A. *Yes.*

* * *

Q. So that at the time of that presentation it was indicated to you on the basis of the projection that *if you substituted Busch Bavarian for Falstaff* you would, in fact, have more sales, is that not true?

A. That was the inference."

(RT 532:14-533:23.)

"Q. I take it then you did not independently determine, as a matter of business judgment, that Busch Bavarian was going to be better than Falstaff immediately?

A. It is very difficult to project that.

Q. *As a matter of fact, you urged, did you not, to both Mr. Elliott and Mr. Newhouse that you be permitted, if you had to give up something,* to give up a brand in which you had a smaller sales, including particularly Regal, is that not true?

A. I was willing at that time to give up a couple of lesser selling items. I don't think Regal was one of them because it wasn't a lesser selling item.

Q. At least lesser quantity?

A. Well, particular reference to items like Mexicali, Bulldog, and the Rainier.

Q. *Now, I think you stated in answer to a question by Mr. Hanger that after the Falstaff product was no longer distributed by you, it lost ground in the market, lost its sales, is that true?*

A. *That is correct."*

(RT 537:3-22.)

* * *

"Q. I see. Now, Mr. Flanigan did finally tell you that Anheuser-Busch would not raise objection if you took on Falstaff line again, is that true?

A. *I was permitted to do business with Falstaff again.*

Q. Now, you have had that line merely a year. Is that long enough to give an estimate as to the present annual sales of Falstaff in your territory?

A. *The present Falstaff sales are less than half of what they were when we gave it up.*

Q. Now, have you been, since you took back the Falstaff line for distribution, carrying out the usual distributor functions to the best of your firm's capacity?

A. In regard to——

Q. Falstaff.

A. Definitely."

(RT 539:7-21.)